CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 180

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DONALD H. OWENS AND MARION HAVILAND OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1938
CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 180

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

DONALD H. OWENS AND MARION HAVILAND OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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194408—38——1

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86479

ONALD H. OWENS AND MARION HAVILAND OWENS (HUSBAND AND WIFE), PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayers: Robert N. Miller, Esq., Ewing verett, Esq., O. H. Chmillon, Esq. For Commissioner: Harry orrow, Esq.

Docket entries

1936	
ept.	9—Petition received and filed. Taxpayer notified. (Fee paid.)
"	9—Copy of petition served on General Counsel.
ct.	28—Answer filed by General Counsel.
"	30—Copy of answer served on taxpayer.
1937	
an.	14—Hearing set February 15, 1937.
eb.	15—Hearing had before Mr. Arundell, Div. 7, on merits. Stipulation of facts (2) filed. Petitioner's brief due 4/1/37—respondent's brief due 5/1/37—petitioner's reply 5/17/37.
lar.	23—Transcript of hearing of February 15, 1937 filed.
"	26—Brief filed by taxpayer. 3/27/37 copy served.
pr.	17—Brief filed by General Counsel.
lay	26—Memorandum Findings of Fact and Opinion entered, Mr. Arundell, Div. 7. Decision will be entered for the petitioner.
"	26—Decision entered, Mr. Arundell, Div. 7.
ng.	19—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
"	28—Proof of service filed by General Counsel. (2). Counsel.
ept.	1—Proof of service on counsel for taxpayer filed by General
"	28—Praecipe with proof of service thereon filed by General Counsel.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted.]

Petition

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A 2:AEF-90D) dated August 29, 1936, and, as a basis for their proceeding, allege as follows:

1. The petitioners are husband and wife whose mailing address is: c/o Bram, Wrightson & Co., 99 John Street, New York City, New York.

2. The notice of deficiency (a copy of which is attached hereto as Exhibit A) was mailed to petitioners on August 29, 1936.

3. The taxes in controversy are income and surtaxes for the calendar year 1934 and in the amount of $336.00.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining the net taxable income of petitioner, Donald H. Owens, for the calendar year 1934 in failing and refusing to allow as a deduction the sum of $1,600.00 representing a loss sustained by said petitioner on account of the wrecking of his automobile during said calendar year.

(b) Respondent erred in determining that the deductible loss sustained by petitioner, Donald H. Owens, on account of the wrecking of his automobile during the calendar year 1934 did not exceed the sum of $35.00.

(c) Respondent erred in determining a deficiency in tax in the amount of $336.00 against petitioners for the calendar year 1934.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) Petitioners, Donald H. Owens and Marion Haviland Owens, are husband and wife and filed a joint income tax return for the calendar year 1934.

(b) Prior to 1934, petitioner had purchased a Nash touring automobile at a cost to him of $1,825.00 which until June 1934 was used by him for personal uses only and was not used in connection with any trade or business carried on by petitioner.

(c) That petitioner did not claim and was not allowed any deduction on account of depreciation of said Nash automobile during any taxable year, nor was a depreciation deduction allowable under the law with respect thereto.

(d) That in June, 1934, by reason of an accidental collision with another automobile, the petitioner's automobile was wrecked and partially demolished and thereafter had a fair market value of $190.00.

(e) That by reason of said accidental collision between the automobile owned by petitioner with another automobile, petitioner sustained a loss of $1,635.00 representing the difference between the cost

to petitioner of his automobile, $1,825.00, and its fair market value after said accidental collision, $190.00.

(f) That petitioner did not at the time of said accident in June, 1934, carry any insurance on his automobile and petitioner has not received any compensation through insurance or otherwise for any of the loss sustained by reason of said accident.

(g) That in determining the taxable net income of petitioners for the calendar year 1934, petitioner, Donald H. Owens, claimed as a loss under Section 23 (e) (2) of the Revenue Act of 1934 the sum of $1,635.00 on account of the accidental collision of his automobile as aforesaid.

(h) That petitioner, in determining said deduction, used as
6 a basis the cost to him of said automobile as provided under Section 23 (h) and 113 (b) of the Revenue Act of 1934.

(i) That under the above cited provisions of the Revenue Act of 1934, the loss on account of the accidental wrecking and partial demolition of petitioner's automobile deductible in determining petitioner's taxable net income for the calendar year 1934 is $1,635.00.

(j) That respondent, in determining petitioner's taxable net income for the calendar year 1934 has allowed as a loss due to the accidental wrecking of petitioner's automobile the sum of $35.00 representing the difference between the fair market value of said automobile in June, 1934, before the accident, $225.00, and the fair market value thereof after the accident, $190.00; and has failed and refused to allow as a deduction any sum in excess of said $35.00.

Wherefore, petitioners pray that this Board may hear the proceeding and determine:

(a) That petitioner, Donald H. Owens, sustained a loss of $1,635.00 on account of the accidental wrecking of his automobile which loss is deductible in determining petitioners' taxable net income for the calendar year 1934.

(b) That there is no deficiency in income tax due from petitioners for the calendar year 1934; and

7 (c) Grant such other and further relief to which petitioners are entitled in law or equity.

(Sd) ROBERT N. MILLER,
Robert N. Miller,
920 Southern Bldg., Washington, D. C.
(Sd) EWING EVERETT,
Ewing Everett,
20 Exchange Place, New York, N. Y.
(Sd) O. H. CHMILLON,
O. H. Chmillon,
920 Southern Bldg., Washington, D. C.
Attorneys for Petitioners.

8 [*Duly sworn to by Donald H. Owens and Marion H. Owens; jurat omitted in printing.*]

Exhibit A, to foregoing petition

AUGUST 29, 1936.

IT:A 2
AEF—90D
Mr. DONALD H. OWENS and
Mrs. MARION HAVILAND OWENS
(Husband and Wife),
% Ream Wrightson & Co., 99 John Street,
New York, New York.

SIR AND MADAM: You are advised that the determination of your income tax liability for the taxable year 1934 discloses a deficiency of $336.00, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period
10 terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By W. T. SUMNWOOD,
Acting Deputy Commissioner.

Enclosures: Statement.
Form 870.
AEF/WGH—2.

STATEMENT

IT:A 2
AEF—90D.

In re: Mr. Donald H. Owens and Mrs. Marion Haviland Owens (Husband and Wife), % Ream, Wrightson & Co., 99 John St., New York, N. Y.

INCOME TAX LIABILITY

Year, 1934; income tax liability, $2,946.55; income tax assessed, $2,610.55; deficiency, $336.00.

The deficiency shown herein is based on the report dated
11 January 27, 1936, prepared by Revenue Agent Kenneth B.

Dyer, a copy of which has been furnished you and on information furnished in your protest and at the conference held in the agent's office on July 21, 1938.

You are advised that your net income and tax liability have been adjusted as follows:

Net income as shown on return	$25,978.85
Add: Deduction disallowed	1,600.00
Net income as adjusted	$27,578.85
Personal exemption	2,000.00
Amount subject to surtax	$24,678.85
Earned income credit	1,400.00
Amount subject to normal tax	$23,278.85
Normal tax of 4% on $23,278.85	931.15
Surtax on $24,678.85	2,015.40
Correct tax liability	$2,946.55
Tax previously assessed, a/c No. 222214	2,610.55
Deficiency in tax	$336.00

EXPLANATION OF CHANGE

The deduction of $1,635.00 claimed as a loss on account of the wreck of a touring car has been decreased to $35.00 and the difference or $1,600.00 disallowed. You are advised that careful con-
12 sideration has been given to all the information furnished relative to this item. However, this office holds that the deduction allowable under section 23 (e) (3) of the Revenue Act of 1934 is the amount of loss actually sustained based on the value of the car at the time of the accident. Since this value has been determined to be $225.00 and the salvage value was $190.00, the difference or $35.00 is held to be an allowable deduction from your net income.

The adjustment of this item indicates a deficiency in tax amounting to $336.00 as explained above.

A copy of this communication has been forwarded to your representative, Mr. Ewing Everett, 48 Wall Street, New York, New York, who has on file in this office a duly recorded power of attorney.

AEF/WGH—2

13 BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted.]

Answer

The Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the respondent erred as alleged in subparagraph (a) to (c), both inclusive, of paragraph 4 of the petition.

5. (a). Admits the allegations contained in subparagraph 5 (a).

(b). Admits that the petitioner purchased a Nash automobile; denies all remaining allegations contained in subparagraph 5 (b) of the petition.

(c), (d). Admits the allegations contained in subparagraph 5 (c) and 5 (d) of the petition.

(e), (f). Denies the allegations contained in subparagraph 5 (e) and 5 (f) of the petition.

(g). Admits the allegations contained in subparagraph 5 (g).

(h), (i). Denies the allegations contained in subparagraphs 5 (h) and 5 (i) of the petition.

(j). Admits the allegations contained in subparagraph 5 (j) of petition.

Denies that the petitioner is entitled to the relief prayed for in the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) HERMAN OLIPHANT,
Herman Oliphant,
General Counsel for the Department of the Treasury,
Of Counsel.

HARRY R. HORROW,
Special Attorney,
Bureau of Internal Revenue.

15 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86479

DONALD H. OWENS AND MARION HAVILAND OWENS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

The amount of loss arising from casualty determined.

O. H. Chmillon, Esq., for the petitioners.
Harray Horrow, Esq., for the respondent.

Memorandum findings of fact and opinion

ARUNDELL: This is a proceeding for the redetermination of a deficiency in income taxes for the year 1934, in the amount of $336.

This proceeding involves only the determination of the amount of loss sustained by reason of damage to an automobile resulting from an accidental collision in 1934.

The facts were stipulated and briefly are as follows:

Findings of fact

The petitioners are husband and wife. Prior to January 1,
16 1934, but after March 1, 1913, the petitioner, Donald H. Owens, purchased a Nash touring automobile at a cost to him of $1,825, which automobile at all times since has been and was until June 1934, used by him for his personal use only and not in connection with any trade or business carried on by him. In June 1934, by reason of an accidental collision with another automobile, the automobile was wrecked and partly demolished. It thereafter had a fair market value of $190. Immediately prior to such collision, the automobile had a fair market value of $225. He carried no insurance on the automobile and has not received any compensation through insurance or otherwise for any part of the loss sustained by reason of the accident.

The petitioner and his wife filed a joint income tax return for the calendar year 1934. No deduction on account of depreciation of the automobile was claimed or allowed during any taxable year. In the return for 1934 filed by the petitioners a loss deduction was claimed in the amount of $1,635, being the difference between the cost and the salvage value of the automobile immediately after the accident. The respondent allowed a deduction in the amount of $35, representing the difference between the fair market value of the automobile immediately prior to the accident and its salvage value immediately after the accident.

Opinion

The facts herein are not in dispute. The respondent con-
17 cedes that the petitioners sustained a loss as a result of the collision of the Nash automobile with another automobile and that the amount of the loss sustained is deductible under section 23 (e) (3) (1) of the Revenue Act of 1934. However, the parties disagree as to the amount of the loss.

The petitioners contend that the loss sustained was a complete loss except for the salvage remaining after the collision and that consequently they sustained a loss in the amount of the difference between the cost of the automobile and the salvage value after the

(1) Sec. 23.
In computing net income there shall be allowed as deductions:
* * * * * * * *
(e) Losses by Individuals.—In the case of an individual losses sustained during the taxable year and not compensated for by insurance or otherwise—
* * * * * * * *
(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. * * *

collision. The applicable sections of the Revenue Act of 1934 are set forth in the margin. Sections 23 (h) (²), 113 (a) and 18 (b) (³), and 111 (a) (⁴). It is apparent from the stipulation of the parties, to the effect that the automobile was wrecked and partly demolished so that a salvage value only remained, that a complete loss resulted except for the value of the salvage remaining after the collision. Section 23 (h), supra, provides that the basis for determining a loss from casualty shall be the "cost." Therefore, the deductible amount of the loss sustained by petitioners is the difference between cost and the salvage value. Francis M. Bass, 30 B. T. A. 4, E. C. O'Bear, 28 B. T. A. 698, affirmed 80 Fed. (2d) 473; Ferguson v. Commissioner, 59 Fed. (2d). 803; and Pioneer Cooperage Co., 53 Fed. (2d). 43, affirming 17 B. T. A. 119, Certiorari denied, 284 U. S. 686. The case of Harry Johnston Grant, 30 B. T. A. 1028, cited by the respondent, involved the determination of the amount of a partial loss due to casualty. Therein a residence property was damaged by the sinking of a portion of the land without 19 physical damage to the building thereon or the remaining land. The formula used therein to determine the amount of such partial loss under the factual situation presented therein is not applicable in determining the amount of a loss where there is a complete destruction or loss except for some salvage of little value, as herein involved.

The respondent contends that the amount of the loss is the difference between the value before and the value immediately after the casualty. A similar contention was made by a taxpayer in Pioneer Cooperage Co., supra, wherein the Board stated as follows:

* * * To carry petitioner's contention to its logical conclusion would be quite disturbing to the taxpayers of the country. It would deny to them deductions for actual losses where their property had fallen in value. If petitioner's property had decreased in value instead of having increased, we seriously doubt whether it would persist in its present condition. Yet, if one's deductible loss is to be measured by the market value of property at the date of loss, when the property increases in value, by the same token it should be measured by

---

(²) Sec. 23.

(h) Basis for Determining Loss.—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the adjusted basis provided in section 113 (b) for determining the loss from the sale or other disposition of property.

(³) Sec. 113. Adjusted Basis for Determining Gain or Loss.

(a) Basis (Unadjusted) for Property.—The basis of property shall be the cost of such property; except (that—[Exceptions not applicable here].

* * * * * * *

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

* * * * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. * * *

(⁴) Sec. 111. Determination of Amount of, and Recognition of, Gain or Loss.

(a) Computation of Gain or Loss.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

the same standard when it has shrunken in value. To apply the rule contended for by petitioner would be to grant deductible losses only where the property had value when lost, and then only to the extent of its then present value, and thus disregard all question of cost or value at date of acquisition. * * *

20 * * * To put it another way, is petitioner entitled to take as a loss an amount, part of which cost him nothing but which is in the nature of unrealized income, or only that amount which it is actually out of pocket?"

The action of the respondent in disallowing the loss claimed in full is, therefore, disapproved.

Enter:

Decision will be entered for the petitioners.

(Entered May 26, 1937)

Before United States Board of Tax Appeals, Washington

Docket No. 86479

DONALD H. OWENS AND MARION HAVILAND OWENS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered May 26, 1937, it is

21 Ordered and decided: That there is no deficiency in income tax for the year 1934.

Enter:

[SEAL] (Signed) O. ROGERS ARUNDELL,
Member.

(Entered May 26, 1937)

In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Petition for review and assignments of error

To the Honorable JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Harry R. Horrow, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

22

I

JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office under and by virtue of the laws of the United States. The respondents on review (hereinafter referred to as the taxpayers) are individuals with their residence in Chappaqua, New York.

The return of the taxpayers for the year 1934 was made to the Collector of Internal Revenue for the Second District of New York, at New York, N. Y., whose office is located in the judicial district of the United States Circuit Court of Appeals for the Second Circuit.

II

NATURE OF CONTROVERSY

On August 29, 1936, the Commissioner, pursuant to the provisions of section 272 (a) of the Revenue Act of 1934 (48 Stat. 741; U. S. C. Tit. 26, sec. 272), forwarded to the taxpayers, by registered mail, a notice of deficiency wherein the taxpayers were notified of the Commissioner's determination of a deficiency of $336.00 in the taxpayers' income tax liability for the year 1934.

23 Thereafter on September 9, 1936, the taxpayers filed their petition with the United States Board of Tax Appeals for a redetermination of the proposed deficiency in their income tax liability for the year 1934 as disclosed by the notice of deficiency, dated August 29, 1936, as aforesaid, which petition was assigned Docket No. 86479. On October 23, 1936, the Commissioner filed with the Board of Tax Appeals his answer to the petition so filed by the taxpayers. The proceeding came on for hearing before a division of the Board of Tax Appeals sitting at Washington, D. C., on February 15, 1937, and was submitted on a stipulation of facts.

The taxpayers are husband and wife. Prior to January 1, 1934, but after March 1, 1913, one of the taxpayers, Donald H. Owens, purchased an automobile at a cost of $1,825.00, which automobile at all times since and until June 1934, was used by him for his personal use only and not in connection with any trade or business carried on by him. In June 1934, by reason of an accidental collision with another automobile, the aforesaid automobile was wrecked and partly demolished. Immediately prior to such accident, the automobile had a fair market value of $225.00, and thereafter it had a fair market value of $180.00. The taxpayer has received no compensation through insurance or otherwise for any part of the loss sustained by reason of said accident.

The taxpayers filed a joint income tax return for the calendar year 1934. No deduction on account of depreciation of the automobile was claimed or allowed during any taxable year. On
24 the return filed for 1934, the taxpayers claimed a deduction in the amount of $1,635.00 on account of the alleged loss sustained by reason of the aforesaid accident. Said deduction represented the difference between the original cost of the automobile and its salvage value immediately after the accident. The Commissioner, in determining the deficiency involved in this proceeding did not allow the full amount of the deduction claimed but allowed a deduction in the amount of $35.00, representing the difference between the fair market value of the automobile immediately prior to the accident and its salvage value immediately thereafter.

On May 26, 1937, the Board of Tax Appeals promulgated its memorandum opinion wherein it was held that the Commissioner erred in failing to allow the full amount of the deduction claimed by the taxpayers. On May 26, 1937, the Board entered its judgment wherein it was ordered and decided that there is no deficiency in income tax for the year 1934.

There is no dispute that the taxpayers sustained a loss which is allowable as a deduction under section 23 (e) (3) of the Revenue Act of 1934 (48 Stat. 689; U. S. C. Tit. 26, sec. 23 [e[[3]). The sole question presented is whether such deduction is measured by the actual loss sustained; namely, the difference between the fair market value of the automobile immediately prior to the accident and its salvage value, as contended by the Commissioner, or by the difference between the original cost of the automobile and its salvage value after the accident, as contended by the taxpayers.

25

III

ASSIGNMENTS OF ERROR

The Commissioner, being aggrieved by the action of the Board of Tax Appeals in the proceeding, desires to obtain a review of its aforesaid decision by the United States Circuit Court of Appeals for the Second Circuit, and alleges as grounds for such review that the Board of Tax Appeals committed the following errors:

1. The Board erred in deciding that there is no deficiency in income tax due from the taxpayers for the year 1934.

2. The Board erred in failing to decide that there is a deficiency in income tax due from the taxpayers for the year 1934 in the amount of $336.00.

3. The Board erred in holding that the Commissioner erred in failing to allow the taxpayers a deduction for the year 1934 in the amount of $1,635.00 by reason of a loss sustained with respect to an automobile used for personal purposes.

4. The Board erred in failing to hold that the deduction allowable to the taxpayers for such loss for the year 1934 is not in excess of $35.00, the amount allowed by the Commissioner in determining the deficiency involved herein.

5. The Board erred in holding and deciding that the amount
26 of the deduction allowable to the taxpayers for such loss is the difference between the original cost of the automobile and its salvage value.

6. The Board erred in failing to hold and decide that the amount of the deduction allowable to the taxpayers for such loss is the difference between the fair market value of the automobile immediately before its partial destruction and its salvage value.

Wherefore, the Commissioner petitions that the aforesaid decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of record be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

(Signed) HARRY R. HORROW,
Harry R. Horrow,
Special Attorney,
Bureau of Internal Revenue.

27 [*Duly sworn to by Harry R. Horrow; jurat omitted in printing.*]

28 In United States Circuit Court of Appeals

[Title omitted.]

Notice of filing petition for review

To:

DONALD H. OWENS,
% Ream, Wrightson & Co., 99 John Street, New York, N. Y.

MARION HAVILAND OWENS,
% Ream, Wrightson & Co., 99 John Street, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1937, file with the Clerk of

the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore
29 rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1937.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 23rd day of August 1937.

(Sgd.) DONALD H. OWENS,
(Sgd.) MARION HAVILAND OWENS,
Respondents on Review.

30 In United States Circuit Court of Appeals

[Title omitted.]

Notice of filing petition for review

To EWING EVERETT, Esq.,
20 Exchange Place, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1937.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

31 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of August 1937.

(Sgd.) EWING EVERETT,
Attorney for Respondents on Review.

In United States Circuit Court of Appeals

[Title omitted.]

Notice of filing petition for review

To:

ROBERT N. MILLER,
920 Southern Building, Washington, D. C.
O. H. CHAMBLISS,
920 Southern Building, Washington, D. C.

32 You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1937.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of August 1937.

(Sgd.) ROBERT N. MILLER,
(Sgd.) O. H. CHAMBLISS,
Attorneys for Respondents on Review.

33 In United States Circuit Court of Appeals

[Title omitted.]

Praecipe for record

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.
   (a) Petition, including annexed copy of notice of deficiency.
34 (b) Answer.
3. Memorandum findings of fact and opinion of the Board.

4. Decision of the Board.
5. Petition for review.
6. Notices of filing petition for review.
7. This praecipe.

(Sgd.) J. P. Wenchel,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 24th day of September 1937.

(Sgd.) Ewing Everett,
(Sgd.) O. H. Cherrillon,
Attorneys for Respondents on Review.

35 [Clerk's certificate to foregoing transcript omitted in printing.]

36 In United States Circuit Court of Appeals for the Second Circuit

No. 163—October Term, 1937

Argued Feb. 18, 1938. Decided March 7, 1938

Helvering, Commissioner of Internal Revenue, petitioner

v.

Donald H. Owens and Marion Haviland Owens, respondents

Appeal from the Board of Tax Appeals

Before L. Hand, Swan, and Chase, Circuit Judges

On petition to review an order of the Board of Tax Appeals expunging a deficiency in the respondents' income tax for 1934.

Louise Foster, of Washington, D. C., for petitioner.

Ewing Everett, of New York City, for respondents.

Opinion

Per curiam.

This appeal involves the question as to how much the taxpayers—a husband and wife filing a joint income tax return—were entitled to charge off as a loss for injury to a motorcar by reason of a collision in 1934. The car had been bought at some undisclosed time before 1934 for $1,825; on June 1st of that year it collided with another car and was so damaged that it was thereafter worth only $190; just before the collision it had been worth $225. The Commissioner allowed $35 as a loss—the difference between the value before the collision and after; the taxpayers claimed $1,635—the difference be-

tween the cost and the value after the collision. The Board ruled with the taxpayers.

Section 23 (e) (3) of the Revenue Act of 1934, 26 U. S. C. A. § 23 (e) (3)—following the language of earlier acts—provided that losses "of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck or other casualty," may be deducted; nobody disputes that collision is a "casualty." Subsection (h) of section 23, 26 U. S. C. A. § 23 (h), declared that "the basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the adjusted basis provided in section 113 (b)." Subsection (a) of section 113, 26 U. S. C. A. § 113 (a), declared that the "unadjusted basis" of property should be its cost; and subsection (b) (1) (B), section 113, 26 U. S. C. A. § 113 (b) (1) (B), that "exhaustion, wear and tear, obsolescence, amortization, and depletion" should be deducted from that "unadjusted basis" in cases when they were "allowed * * * under this Act." But section 23 (*l*), 26 U. S. C. A. § 23 (*l*) allowed for exhaustion, wear and tear, or obsolescence only in the case of "property used in the trade or business"; and on this account the respondents could not have claimed any deduction for wear and tear of the car during the years before 1934.

Verbally the conclusion is nevertheless inescapable that the "adjusted basis" was the same as the "unadjusted," and was the original cost; and, even though this secures to the owner a deduction which he could not have claimed, had he quite worn out the car without mishap, it may have been deliberately granted, for the destruction of property, still serviceable, often involves a greater loss to the owner than the money it would fetch on any market. Be that as it may, the letter is too plain; we should have to disregard the words,
and should not be interpreting them, if we refused to take them
37 just as they read. Colloquially, it is true, the whole loss was not "sustained" in 1934, as required by section 23 (e); but the earlier losses had never been "realized" in terms of money, and our income tax does not ordinarily "recognize" such losses; property used for convenience or pleasure, unlike business property, is no exception. The Treasury must take the bitter with the sweet; and just as increases in value do not increase the taxpayer's permissible deduction; (Pioneer Cooperage Co. v. Commissioner, 8 Cir., 53 F. 2d 43); so decreases should not decrease it.

Order affirmed.

38 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DONALD H. OWENS AND MARION HAVILAND OWENS, RESPONDENTS

Judgment

Filed March 14, 1938

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

39 [File endorsement omitted.]

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 42665. U. S. Circuit Court of Appeals, Second Circuit. Term No. 180. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Donald H. Owens and Marion Haviland Owens. Petition for a writ of certiorari and exhibit thereto. Filed July 6, 1938. Term No. 180 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE, 1938